CERTIFICATION OF THE CONSTITUTION ADOPTED BY THE CONSTITUTIONAL ASSEMBLY ON 8 MAY 1996

FROM: THE HUMAN RIGHTS COMMITTEE OF SOUTH AFRICA (HRC)

1 . INTRODUCTION

The Human Rights Committee of South Africa, founded in 1981, is an independent non-governmental organisation committed to the promotion and protection of human rights. Through its Human Rights Legislative Monitoring and Advocacy Project, it has monitored and made numerous submissions during the constitution-making process to ensure that the final text entrenches a human rights based constitutional democracy. It is in this spirit that the HRC wishes to raise concerns about the certification of the constitutional text.

While the HRC supports the majority of the provisions, we highlight several sections which we believe should be referred back to the Constitutional Assembly for revision, in terms of section 73A of the interim Constitution. The issues which are raised are issues which the HRC has been intricately involved in over the life of the constitution-making process and which are central to the work of the organisation.

The thrust of this document is to raise the fundamental concern that constitutional negotiations have resulted in increased executive and parliamentary power. We believe that the reach of this power violates the fundamental democratic principle of separation of powers and permits infringements of human rights unacceptably. Checks and balances on the exercise of powers to appoint judges and members of human rights institutions are also seen to be insufficient.

2. METHOD

The document is divided into three sections; the bill of rights, constitutional amendments, the judiciary and state institutions supporting constitutional democracy. In each section, various provisions are identified as problematic. Under each of these heads, the relevant constitutional principles are identified and a brief motivation for our concern is given. Where possible, the applicable part of the constitutional principle identified is in bold to assist the reader.

3. THE BILL OF RIGHTS

3.1.1 Section 35(1)(f)

'Every-one who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.'

Section 35(1)(e)

‘ at the first Court appearance after being arrested to be charged or informed of the reason of her or his further detention failing which she or he shall be entitled to be released'

3.1.2 Relevant Constitutional Principle(s):

Principle II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of the (interim) Constitution.

Principle V

The legal system shall ensure the equality of all before the law and an equitable legal process.

3.1.3 Grounds

Section 35(1)(f), unlike its corresponding provision in the interim Constitution (s25(2)(d), is ambiguous in its implications for the onus of proof in bail proceedings. Through HRC’s legislative monitoring, we have learnt that the intention behind this shift is an attempt to ensure that the recently enacted bail legislation survives constitutional scrutiny. This legislation (The Criminal Procedure Second Amendment Act 1 995) reverses the onus of proof in bail proceedings for certain serious offences. The provision in the interim Constitution uses the word 'unless' in place of 'if', and has been held by the Supreme Court to mean that if there is an onus of proof in bail proceedings, it would lie with the state (Ellish en Andere v Prokureur-Generaal, Witwatersrand 1 994(5) BCLR 1 (W).

The HRC believes that in light of the constitutional principles listed above, the Constitution should unequivocally require the state to bear the onus of proof in bail proceedings. The Constitutional Court has identified the universally recognised rights to be presumed innocent and not to be deprived of one's liberty as fundamental. Reverse onus provisions in bail proceedings not only violate these rights, but in the South African context, discriminate inequitably against unrepresented accused persons in the legal process. While the measure is regarded by its proponents as a justifiable limit to rights in light of the need to fight crime, this method fails to achieve this end. If due regard to the fundamental right enshrined in section 25(2)(d) of the interim Constitution had been given, HRC believes that the term 'unless' would have been retained.

Section 35(1)(e) was the final amendment in the Constitutional negotiations and postulates that there could be a reason for further detention other than the fact that there is a charge pending against the arrested individual. This section as mentioned above seeks to limit the protections available to accused individuals.

3.2.1 Section 36(1)

'The rights entrenched in this Chapter may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including - ...'

3.2.2 Relevant constitutional principle(s)

Principle II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to interalia the fundamental rights contained in Chapter 3 of the (interim) Constitution.

3.2.3 Grounds

The section violates Constitutional Principle 11 in that rights are insufficiently protected from state power. The limitations clause, being the vehicle through which government can limit rights, needs to offer strong protection in order to prevent the abuse of state power. Negotiations on the clause in the Constitutional Committee centred on whether limitations on rights should have to be 'necessary' or only 'reasonable and justifiable', it being common cause that the latter test introduces a lower level of scrutiny than the former. The argument which ultimately held sway with negotiators and which resulted in the adoption of the lower test was that this was necessary in order to facilitate government's fight. against crime.

In HRC's view the human rights culture envisioned by Principle II requires a stricter test to apply to the limitation of rights. Given South Africa's history of human rights abuse and the difficult challenges which transformation presents, it is crucial that the Constitution offers maximum protection to human rights. The first two years of democratic governance has already seen human rights being sacrificed for the sake of political expedience and alarm bells are already ringing for those who would like to place their full trust in government. In order to establish a human rights culture in South Africa, it is vital that government be compelled to find solutions which do not compromise rights standards unnecessarily. While one can fully support government's commitment to fight crime, lowering the protection offered to human rights is not a legitimate method. All fundamental rights, not only those which have an impact on crime prevention measures, are affected.

3.3.1 Section 37.

'A state of emergency may be declared only in terms of an act of parliament and only when the life of the nation is threatened by war, invasion... and only when the declaration is necessary to restore peace and order.'

3.3.2 Relevant Constitutional Principle(s)

Principle 11

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to interalia the fundamental rights contained in Chapter 3 of the (interim) Constitution.

3.3.3 Grounds

Section 37 sets out when a state of emergency can be declared. A crucial omission is that the provision is silent on who can declare a state of emergency.

Given the extensive powers of the state to limit human rights during an emergency, it is also imperative that the Constitution explicitly makes provision for how a state of emergency should be declared. Because of the extreme nature of this event it is important that such a provision should not permit one individual on their own to declare a state of emergency.

In terms of section 37, 21 days are given before parliamentary oversight occurs. The HRC believes that seven days is sufficient time for the National Assembly to convene to decide this crucial issue.

4. CONSTITUTIONAL AMENDMENTS

4.1.1 Section 74. Amending the Constitution

4.1.2 Relevant Constitutional Principle(s)

Principle IV

The Constitution shall be the supreme law of the land

Principle XV

Amendments to the Constitution shall require special procedures involving special majorities.

4.1.3 Grounds

This section fails to provide sufficiently stringent mechanisms to amend the Constitution. Such an instrument should not easily be susceptible to amendments which the text in its present form is. Section 74 simply requires a two thirds majority of the National Assembly for an amendment to occur. Support from the National Council of Provinces is only required where an amendment concerns the powers, functions or boundaries of the provinces.

The National Assembly should not be allowed to amend the supreme law of the land so easily as this effectively make parliament supreme. In the 2 years of the interim Constitution, nine acts have been passed amending the Constitution. Each of the acts has included various amendments. This is

a trend which the HRC sees as problematic and believes that such a practise could be used to manipulate the result of court cases which Parliament is unhappy with.

At a minimum, both houses of Parliament should be involved in the process to amend the Constitution. A two thirds majority should be obtained in both houses. At present an amendment which relates to provinces requires only the approval of six provinces. The HRC believes that seven of the nine provinces should agree to amendments and that this procedure should apply to all constitutional amendments.

5. THE JUDICIARY

5.1.1 Section 1 78 (1) The composition of the Judicial Service Commission

5.1.2 Relevant Constitutional Principle(s)

Principle I

The Constitution of South Africa shall provide for the establishment of...a democratic system of government ...

Principle VI

There shall be separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.

Principle VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power...

5.1.3 Grounds

Who the judge is is crucial in the outcome of a particular case, particularly in constitutional adjudication and therefore how, and by whom, judges are appointed is of utmost significance. The Judicial Service Commission has the major responsibility to appoint judges and therefore, as a mechanism, must be capable of ensuring that judges appointed are independent of the other arms of government. This principle is fundamental to the separation of powers and therefore to the establishment of a democratic system of government. In HRC's view the composition of the Judicial Service Commission is unfairly weighted in favour of the legislature and the executive, and therefore does not reflect the appropriate balance of interests to promote an independent judiciary.

In terms of the interim Constitution, the JSC was made up of 4 parliamentarians (senators), 5 executive appointments (4 in consultation with Cabinet), 5 members from the legal profession with the remaining three members representing key posts in the judiciary. Thus there were 17 permanent members.

Of the 23 permanent members of the JSC under the final Constitution, 10 are parliamentarians, 5 are executive appointments (4 in consultation with political party leaders) and representation of the judiciary and the legal profession remains the same.

Thus, the primary distinction between the composition of the JSC under the interim Constitution and the final text is that legislative representation is increased by 6 members. Thus, while under the interim Constitution the legislature constituted 23.5% of the JSC, under the final Constitution it constitutes 43.5%. In addition, political party leaders are consulted on 4 executive appointments, thereby giving politicians effective say in over 60% of the JSC's membership. The executive and legislature together control over 65 % of the JSC's membership, thus exercising effective control over judicial appointments.

Criticism was levelled at the provisions in the interim Constitution for failing to balance government representation with that of civil society. The final provisions now present the added problem that representation is too heavily weighted in favour of the other two arms of government.

(The HRC made submissions earlier this year to the CA on how to achieve this balance)

5.2.1 Section 175. Acting judges.

Acting-Judges of the Constitutional Court are appointed by the President on the recommendation of the Minister of Justice acting with the concurrence of the President of the Constitutional Court and the Chief Justice. The Minister of Justice appoints acting judges to other courts after consultation with the senior judge of the court on which the judge will serve.

5.2.2 Relevant Constitutional Principle(s)

Principle I

The Constitution of South Africa shall provide for the establishment of ... a democratic system of government ...

Principle VI

There shall be separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.

Principle VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power...

5.2.3 Grounds

The power to appoint acting judges lies largely with the Minister of Justice, especially for judges other than Constitutional Court judges where the Minister effectively has sole discretion to make

appointments. While the peculiar circumstances surrounding the appointment of acting judges may justify departing from the normal procedures, it is crucial that there are checks and balances on the exercise of this power. Without these checks and balances, political control over judicial appointments is sanctioned, thereby compromising the principle of the separation of powers.

Safeguards which negotiators have omitted to consider would include tenure restrictions, open process and the involvement of the JSC in various ways.

5.3.1 Omission. Section 178(6)

Provision for the Judicial Service Commission to conduct appointment procedures in public.

5.3.2 Relevant Constitutional Principle(s)

Principle VII

There shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.

5.3.3 Grounds

Holding appointment proceedings in public is crucial for ensuring that appointments are conducted without fear, favour or prejudice and thereby constitute a fundamental check and balance to the exercise of power. This has already been demonstrated in the appointment process of Constitutional Court judges in 1994. While the current practice of the JSC is to hold interviews in public, there is no guarantee that this will necessarily continue. In light of the explicit direction in the principle stated above to include appropriate checks and balances to ensure accountability and openness, the HRC believes that the Constitution should compel the JSC to conduct appointment proceedings in public.

6. STRUCTURES OF GOVERNMENT PROMOTING CONSTITUTIONAL DEMOCRACY

6.1.1 Section 193.

Appointment of members of state institutions supporting constitutional democracy.

6.1.2 Relevant Constitutional Principle(s)

Principle XXIX

The independence and impartiality of a Public Service Commission, A Reserve Bank, and Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

6.1.3 Grounds

Chapter 9 establishes various watchdog institution (including the Auditor-General and the Public Protector) which have the function, inter alia, of checking the exercise of parliament's power. It is therefore crucial, in order to ensure their independence, that appointments to these bodies are not controlled by political parties. However, the appointment provisions have the effect of placing responsibility squarely in the hands of parliament. The independence and impartiality of the structures are thereby compromised by permitting parliament to appoint its own watchdogs.

Throughout the CA process, it was argued by various interest groups, including the HRC, that civil society itself should have representation on the appointment committee. Negotiators, while retaining a parliamentary committee as the appointing structure, agreed to include section 193(6), which empowers the committee to involve civil society in the recommendation process. However, when this subsection is read with section 59(a), to which it refers, it appears that it could have the effect of removing the duty to involve the public which would be required if section 193(6) had not been approved. This interpretation is drawn from the use of the word 'may' in section 1 93(6) and the use of the word 'must' in section 59(a). In light of the requirements of accountability, openness and responsiveness, it is vital that the public's involvement is guaranteed.

We thank you for the opportunity to address the Court on some of the issues that we believe make the Constitution deficient.

Jeremy Sarkin
National Chairperson

Human Rights Committee of South Africa

BRAAMFONTEIN
18 April 1996

CERTIFICATION OF CONSTITUTIONAL TEXT

The Human Rights Committee is a non-governmental organisation, founded as the Detainees Parents Support Committee in 1981, committed to the protection and promotion of human rights. Our Human Rights Legislative Monitoring and Advocacy Project has over the past few years monitored, reported on and participated in the constitution-making process with the aim of ensuring that the final document will provide for sound structures of governance and will protect human rights adequately.

The last phase of the constitutional negotiations have now been reached with political parties attempting to reach consensus on outstanding issues. The crucial stage when the Constitutional Court has to certify whether the text complies with the 34 constitutional principles is thus drawing near.

We note that the Constitutional Court has set aside the month of June to perform its functions in terms of section 71 of the Constitution. We note too that the Constitutional Court rules (15(3)) empower the President of the Court determine the way in which the matter shall be disposed of. Political parties represented in the Constitutional Assembly shall however be entitled to present oral argument to the Court as of right.

The proposals put forward in this letter relate to the President's discretion to determine the way in which the Court's section 71 function is dealt with. We wish to raise two points.

Firstly, we urge the court to set a process in motion enabling civil society to make representations to the Court on the question whether the constitutional text complies with the 34 Constitutional Principles. The HRC believes that civil society, and not only political parties, should be given this opportunity. We note from documentation of the Management Committee of the Constitutional Assembly that parties are preparing to brief counsel to make representations to the Court. Given the time needed for preparations, it would therefore seem necessary for decisions in this regard to be made expeditiously. The process could however take various forms. Public hearings could take place around the country or the public could be invited to make written submissions.

Our proposal is motivated by the following reasons. Firstly, it has been stated from the outset that public participation is a key element of the constitution-making process and it is common cause that the legitimacy of the final document rests on whether it is acceptable to the South African public. Secondly, political party submissions cannot on their own provide the court with a balanced view on whether or not the text complies with the Constitutional Principles.

The final stages of the constitution-making process have been characterised by closed political party negotiations, (referred to a bi- or multi-laterals), and it is in these forums where political agreement on contentious issues has been reached. Although civil society was given the opportunity to present heir views at two distinct phases of the process, critics have observed that insufficient public participation has taken place and that the key agreements reflect political compromise and trade-offs. These trade-offs have been made during the past few months, this being after the deadline (20 February) for public comment on the November draft. Thus civil society has been effectively excluded from the last and crucial phases of the process. This is particularly true of more marginalised groups. Moreover, civil society has not been afforded the opportunity to comment on whether the final package complies with the principles which underlie a democratic nation.

The HRC believes that some of the trade-offs potentially undermine key components of the Constitutional Principles. Insufficient separation of powers, independence of the judiciary, checks and balances on state power, transparency in government as well as a weakened bill of rights are issues: which are of particular concern. Short-term political gain and pandering to electoral and governmental strategies have motivated compromises, with the result that the text may not serve as a long-standing superstructure for a stable constitutional democracy.

In this context, it is crucial that civil society be afforded an opportunity to present their views to the Court on the issue of whether the parties have complied with their mandate to draft a text in

accordance with the agreed on principles. The monolithic views of political parties which have forged consensus cannot be sufficient to give the court a balanced view of whether or not the text meets the requirements of the Constitutional Principles.

Our second point relates to the need to make the procedure and the approach which the Court will adopt in exercising its function publicly known. The public needs to assured that the Court, as the ultimate determinant of whether or not the text can serve as South Africa's supreme law, is taking its role seriously.

The adoption of the final Constitution signals a critical point in the country's history. As the supreme law of the land, it must not only reflect the diversity of the nation, but be a voice of the peoples of this nation. it is crucial that the final text is not only a document of the political parties, but, that all South Africans are satisfied that the parties have fulfilled their mandate.

PROF. JEREMY SARKIN
Chairperson, Human Rights Committee

TO: Human Rights Committee of South Africa

28 May 1996

Further to your facsimile dated 18 April 1996 and our reply reference 1/14/18, for the sake of your records. I have been asked by the President of the Constitutional Court to inform you that all Constitutional Court judges did in fact receive copies of your letter and that due account has been taken of it.

M S NIENABER